VOLUME 14 PART 3 — Pages 33-48

THE AUSTRALIAN LAWYER

MARCH 1961

BUTTERWORTH & CO. (AUSTRALIA) LTD.
(INCORPORATED IN ENGLAND)
6-8 O'Connell Street
SYDNEY
MELBOURNE: 430 Bourke Street :: 240 Queen Street, BRISBANE
Registered in Australia for transmission by post as a periodical.

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PROBLEMS OF EVIDENCE AT INQUESTS AND IN PRELIMINARY CRIMINAL PROCEEDINGS*

by

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Recent dramatic inquests in Sydney have drawn attention to a serious problem affecting the trial of accused persons which has also been considered recently by an important English departmental committee headed by Lord Tucker.

The problem springs from the danger, particularly in sensational cases, that the published reports of evidence admitted at preliminary criminal proceedings may so affect the minds of all potential jurors that the subsequent trial cannot be a fair trial according to law.

Two principal forms of proceedings before trial give rise to this danger. The first is the inquest by a coroner. The second is the preliminary investigation before a magistrate to determine whether there is sufficient evidence to justify committal of an accused for trial. The problem referred to the English Tucker Committee on Proceedings before Examining Justices concerned publicity during proceedings of the second type, but both types involve the danger to just criminal law enforcement unless they are adequately regulated.

As his title implies, a coroner is a person who represents the Crown. The office dates back at least to the twelfth century, long before the present-day system of jury trial and evidence came to be settled. At that time a principal source of Crown revenue arose from the forfeiture of the goods of convicted felons, including felonious suicides. From this mercenary origin it has developed into a most important form of inquiry into sudden or unexplained deaths.

Ancient origin

Its ancient origin has one most important consequence. A coroner may admit evidence that would be excluded in an ordinary trial. Even today it is desirable that the coroner should be free from the normal rules of evidence in his inquiry, provided that precautions are taken to ensure that a person subsequently charged with murder is not prejudiced by this freedom.

The preliminary investigation before a magistrate originated in the sixteenth century and fulfilled a purpose much different from its present one. At first it was an inquisitional procedure in which the accused was closely examined by a magistrate in an attempt to ascertain his guilt. At present it merely ensures that an accused person is not put to the humiliation and damage of being tried where there is clearly insufficient evidence to indicate he has committed an offence.

* This article is reprinted from the *Sydney Morning Herald* of 4 January 1961 by kind permission of the Editor, which is gratefully acknowledged by the Publishers, and by courtesy of Professor Julius Stone, Challis Professor of International Law and Jurisprudence at the University of Sydney.

It must be emphasized that it is not the present function either of the coroner or the examining magistrate conducting the preliminary inquiry finally to determine the guilt of a person committed for trial. Their function is merely to determine whether there are enough suspicious circumstances to justify an inquiry into the guilt or innocence of the accused. Because of this the legal advisers of persons under suspicion frequently advise their clients against trying to prove their innocence in the preliminary proceedings, either because of expense or because by not disclosing the defence until the trial it can then be presented more effectively.

One-sided

This practice often makes the preliminary investigation rather one-sided, because the Crown evidence is produced without careful testing in court of its accuracy and without even any attempt at explanation of suspicious circumstances by the person whom it seems to implicate. When members of the public (including the future jurors) read reports of such evidence day after day, in cases catching the public imagination, they are likely to jump to conclusions as to the guilt of the accused.

The man in the street will, of course, tend to ask why it should matter anyhow where the jurymen at the later trial get the knowledge on which they reach their verdict. The answer is that the whole basis of modern jury trial is that the accused is to be tried on evidence given in court at his trial, where he can confront and cross-examine the witnesses, and not on any information otherwise acquired. This is basic to an idea of a fair trial.

A sounder instinct of the man in the street is to say that anyhow the jury will have an opportunity of hearing the evidence at the trial and having it there tested by cross-examination, and receiving any directions of the judge concerning it. But even this is only sound on two conditions. One is that the future juryman has not been so deeply impressed by Press and radio reports of the evidence in the preliminary proceeding as to close his mind on the question of innocence or guilt, so that later on, as all of us do when prejudiced, he listens only to that part of the evidence which confirms his prejudice.

Even more important is the second condition, which is that all the evidence admitted and publicized during the preliminary hearing also turns out to be admissible and admitted at the actual trial, so that it can there be dulyweighed and tested. For let us suppose that the evidence on which the future juryman forms an opinion of the accused's guilt during the preliminary hearing turns out to be not lawfully admissible, so that it is excluded at the trial. The juryman may still be led by his preformed opinions to find the man guilty, even though the actual evidence admitted at the trial did not warrant this conclusion.

To understand the importance of this it is vital to realize that our law excludes many kinds of evidence, especially in criminal trials, even when these are relevant to guilt in an everyday sense. Our judges have built up over the centuries

many rules to protect the citizen from well-known weaknesses of human judgment, as well as from abuse of power by police and other State authorities. And English criminal law, although it is far from perfect, is famed throughout the world for many of these safeguards.

For instance, the judges have laid down very severe requirements to be fulfilled before an alleged confession of the accused can go before a jury, mainly in order to guard against third degree methods by the prosecuting authorities. They have also laid down rules, recently much agitated in relation to the Crimes Bill, excluding evidence of the accused's character, his prior criminal convictions or offences, or acts similar to those charged. This was to avoid prejudice and to prevent a man being tried for the events of his whole life, instead of for the offence charged.

Moreover, equally important in civil and criminal cases, the judges have with certain exceptions excluded hearsay evidence, that is, statements concerning relevant matters which are not made from the witness-box and therefore not under oath and cross-examination.

Now, if evidence of any of these kinds which will later be excluded at the trial is nevertheless admitted in the preliminary proceedings, and given such wide publicity that virtually all adults in the community read and remember it, what is the position of those who find themselves members of the jury when the case comes to final trial?

Confession

Let us suppose that there has been a confession read at the preliminary hearing in a sensational case. At the trial, let us suppose, the judge refuses to let it be put before the jury because the legal requirements are not fulfilled. Is it not certain that virtually every juryman will nevertheless remember that (as he thinks) the accused has confessed? And is there any doubt that even if the judge should direct the jury to dismiss from their minds everything that they have heard or read before the trial, most jurymen will still be influenced more or less in coming to their verdict by the memory of the confession?

It was indeed this kind of consideration, arising from the well-known murder case involving Dr. John Bodkin Adams and his elderly patients in 1957, which led to the appointment of the Tucker committee. The existing English law and practice on this matter at that time was not very different from our present practice. And even though in the Adams case itself the accused was finally acquitted, the committee was still unanimous that the danger to the British ideal of a fair trial required that the law be changed.

The committee was asked two questions. One was whether the preliminary proceedings should be held *in camera*, and the other was to what extent publication of reports of the proceedings should be permitted even if the proceedings were public.

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On the first point, while it recommended slight changes in the power to hold proceedings *in camera*, its general recommendation was in the negative.

Obviously the open public hearing is a vital guarantee of individual liberty. On the matter of publication of reports, however, the committee, after hearing many witnesses, unanimously recommended severe restrictions on the particulars which may be published in reports of preliminary proceedings.

In substance, the committee said that these particulars should be limited to identifying the court and its members, the accused, the prosecutor, the offences charged, the name, address, occupation and age of witnesses, the names of the lawyers engaged, the decision to commit for trial, and the court to which the accused is committed, and particulars of bail, if any.

This limitation was to apply, of course, only if the accused was committed; there was no need for restrictions if he was discharged. And, of course, the restrictions on publication would cease to apply after the end of the actual trial itself. The committee declared finally that it was satisfied that "no lesser reform would be both adequate and practicable".

Clearly, Australian experience, for instance with hearsay at inquests, suggests that parallel problems should be receiving attention in this country. Obviously, the step of restricting publication of reports would be felt as a serious hardship by some sections of the Press, especially those which concentrate, perhaps too much, on sensational matters.

The New South Wales Legislature has attempted a different approach. *The Coroners Act* 1960, to come into operation early in 1961, provides in a long and cumbrous s. 28 that where a person has been charged with an indictable offence, or where the coroner considers that the evidence establishes a prima facie case that some known person committed an indictable offence, the inquest is to be adjourned *sine die*, that is, indefinitely. Normally it will not be resumed until the suspected person has been tried.

While this approach is commendable so far as it goes, it falls short in some respects and goes too far in others. It falls short because where no one has yet been charged with an offence, inadmissible evidence implicating a person who later may go on trial may still, under the new Act, be produced and publicized at the inquest. It may go too far where someone has been charged, because provision for indefinite adjournment of the coroner's inquest may in some cases cut short inquiries which are not only harmless but positively useful.

Trial danger

More important, it falls very short in so far as it covers only coroner's inquests and similar inquiries, and not the preliminary criminal proceedings before magistrates with a view to committal, which so concerned the English Tucker Committee. The new Act in no way prevents the dangers to a fair trial arising from such preliminary proceedings for committal; its effect is mainly indeed to concentrate the dangers at this point.

There are indications that further legislation may have to be considered. The New South Wales Bar Association has appointed a committee to consider some aspects of inquiries by a coroner, but it will no doubt take into account the broader problems stressed by the Tucker Committee. The problem is a difficult one. It involves a compromise in the public interest between the function of freedom of the Press in guaranteeing the integrity of criminal justice and the need to guard against such freedom of the Press undermining justice in this particular kind of proceedings.

All responsible sections of the Press and radio will certainly share the anxiety of the Bar and of the whole community to safeguard the fine achievements and traditions of our system of criminal trials.

PRACTICE NOTE

[Supreme Court of N.S.W.]

On 16 February 1961, the Judge in Divorce (Mr. Justice Dovey) made the following practice announcement:—

> In all cases in which there are children under the age of 16 years, the terms of any arrangements for their welfare, etc., as mentioned in s. 71 of the Act [*Matrimonial Causes Act* 1959], should be reduced to writing and tendered to the Court as an exhibit.

The Australian Lawyer, March, 1961.

PROPOSED CHANGES IN THE ADMINISTRATION OF THE TORRENS SYSTEM IN NEW SOUTH WALES

An address delivered to the Convention of Regional Law Societies on 27 October, 1960

by

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Administrative Assistant and Deputy Registrar General

Registration is now big business. It is, moreover, a highly specialized business, and within it is the further specialization of the "Torrens Business".

In the Torrens Business the managerial functions of staff selection, staff training, staff control, work flow and accommodation planning are clearly recognized. There are other aspects of the Torrens System which qualify as management matters, however, but which are less clearly recognized as such.

The 19th Century was one of rapid expansion of legislative activity, much of it devoted to reform in many branches of the law. The land law was especially ripe for reform: the technicalities of conveyancing were ill-suited, for example, to the changed nature of landholding. With the development of the concept of land as a commodity it had become essential to equate the buying, selling and pledging of land with the buying, selling and pledging of chattels.

Robert Torrens was a layman, an administrator, a member of Parliament, a pamphleteer and reformer. He looked at conveyancing from the outside, as it were, and evaluated it against the criterion of function in the social structure.

The aim of the Bill which he steered through the South Australian Parliament was defined as declaring the title to land and facilitating its transfer. The New South Wales Act was modelled closely on the South Australian.

The aim of declaring titles and facilitating transfers constitutes the primary goal of the Torrens administrator, and the Act prescribes two basic principles for its achievement: firstly that title be declared by a State authority instead of being evidenced by documents *inter partes;* secondly that conveyancing be by simple forms which operate not as evidence of title but as evidence on which declarations of title are made. That much constitutes the Torrens foundation, standing on the soil of current law: the framework erected on that foundation is, I submit, essentially a matter of management. The declaring of title by the certificate of title, its issue in duplicate, the binding of the duplicate in a register book, the effecting of registrations by the entry of memorials on the certificate of title, the design of the certificate of title and forms of instruments, the business paper, the index and plan charting are management matters. Some of these matters are prescribed in the Act, but that does not divest them of their management nature. If punched cards were used instead of a register book, for example, it would still qualify as the Torrens System.

The point I emphasize is that these are means to an end, the end being the social one of facilitating dealings with land.

Forecasting

Attainment of the primary goal calls for the exercise of the basic managerial skills, including forecasting and planning.

Forecasting is one of the most important but difficult functions of management. Planning can only be as effective as forecasting is accurate, and good planning focuses on the needs of tomorrow rather than on those of today. The essence of forecasting is to predict the future from past and present trends, and that is always difficult. It involves keeping the administrative finger upon the pulse of the community. Management in private enterprise must keep ahead of the market for survival: it is of equal importance for a government administration. Forecasting must include within its ambit long-range economic and industrial development, migration and social trends such as family housing patterns. As a specific example, present forecasting must have regard to the demand for strata titles as evidenced by the Bill now before the New South Wales Parliament.

The forecast is that the increase in business will continue, and it is evident, from the serious difficulties which are now experienced in attaining the primary goal of an efficient community service, that decisive steps must be taken if the system is to survive the pressure of tomorrow's business.

Analysis of existing systems

An analysis and evaluation of existing systems and procedures is a prerequisite for valid planning. This is particularly so in the case of a registry where management thought is centred around records systems and where procedures are governed by those systems for better or for worse. And it is well to remember that records management, as well as general managerial techniques and aids, has developed a very long way in one hundred years.

During the past twelve months the operation of the system in this State has been exhaustively examined with the aid of an Organization and Methods Team appointed by the Public Service Board of New South Wales. A functional approach was adopted, in the process of which each aspect of the system—even the issue of certificates of title in duplicate—was weighed in the balance. Several fundamental defects have been identified.

Records available

The ready availability of records to members of the public and staff is essential for an efficient service. At present, the greatest single impediment to work flow and searching is that records are not readily available.

Register books become unavailable because of the simultaneous need by members of the public and staff to refer to different folios in the one book or even to the one folio. Individual folios which are the subject of such competitive demand are generally folios for land in process of subdivision. The one and only charted office copy of the plan of subdivision —which serves as the land index in the New South Wales system —is also involved in this competition.

Search objective

Title to a particular parcel of land is declared by a certificate of title together with relevant current mortgages, etc., referred to in the certificate. This could well be termed the "search objective". Frequently, however, it can only be ascertained by tracing through a number of cancelled or partially cancelled folios of the register and dealings.

Dealings which are of no further search value and cancelled certificates of title must be retained because many of them constitute essential links in tracing references to current titles. This has resulted in the accumulation of an enormous volume of records, by far the greater part of which is dead although inadvertently active. This, too, impedes work flow and searching. It aggravates the non-availability of records and causes a serious storage problem.

Preparation of certificates

Approximately 50,000 pairs of certificates of title are now prepared annually, each pair being the subject of an individual preparation. The majority of new certificates of title arise from sales of parts of land in previous titles. A plan of subdivision containing, say, 100 lots is lodged and registered. As a transfer of each lot is subsequently lodged for registration a new certificate for that lot is prepared, that is, the subdivision involves one hundred separate preparations. This is extremely expensive in terms of work effort and precludes any method of mass production. Also, each preparation acts as a clog on the registration production line and necessitates the use of records.

Planning

It appears, therefore, that planning should be directed at

making records readily available to members of the staff and public,

eliminating partially cancelled certificates of title,

registering as many dealings as possible "by endorsement", that is, without coming "off line" for new certificate of title preparation or any other purpose,

providing a direct link between a plan of subdivision and the current certificate of title for each parcel of land,

systematically withdrawing "dead" records,

replacing the individual-production method of preparing certificates of title by a mass-production method and

providing a diagram on every certificate of title.

Torrens foundation

Although this does not involve any change in the "Torrens foundation" it does involve changes in the basic framework of the system necessitating management action beyond the traditional limits.

Remedies

Remedies can only be fully effective if they strike at the root causes of existing difficulties, and these lie deep within the system. Such remedies, of course, are apt to be less spectacular in their immediate effect than palliative measures. But it is only on the basis of positive and long-range remedial planning that additional staff and improved plant and accommodation can play their rôle in the attainment of the primary goal.

First stage of plan

As the first stage of a comprehensive plan it is proposed, immediately following registration of a plan of subdivision, to issue in the name of the subdivider a certificate of title for each lot comprised in the plan. By thus advancing the certificate of title preparation, the way is opened for introduction of a mass-production method. The method selected is a combination of xerography (electrostatic photography) and offset printing. Apart from speed of operation this method offers two major advantages: it yields a printed image on non-sensitized paper and permits reproduction of a plan to a reduced scale on the certificate. It is intended to print on each certificate of title issued by this method the whole or a substantial part of the relevant plan of subdivision.

It is considered that this proposal will

enable the Department to cope with the increasing demand for the issue of new certificates of title by considerably reducing the work content of certificate of title preparation,

enable the provision of better than a diagram on each certificate of title,

facilitate searching and work flow by eliminating partially cancelled certificates of title,

facilitate searching by making records more readily available to members of the public. After registration of the plan, records will not be required subsequently for certificate of title preparation,

expedite registration by enabling transfers of lots in plans to be registered by endorsement, that is, without coming "off line". Individual certificates of title will be available to be handed over on settlements.

Ancillary changes

To facilitate operation of the xerographic and offset printing equipment, and to further facilitate searching and expedite the registration of dealings and plans, a number of ancillary changes have been planned.

All plans must be lodged in Survey Drafting Branch separately from dealings. The only exceptions to this will be plans annexed to or endorsed on caveats or leases or which are prepared solely for the purpose of showing the sites of easements, provided they are not original plans of survey or do not bear original approvals of councils.

All plans lodged in Survey Drafting Branch must be drawn in accordance with prescribed forms.

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All plans must be free from blemishes and creases and must be accompanied by one print.

All plans will be recorded in one register as "Deposited Plans", registration numbers being allotted on lodgment. At present there are four separate plan registers and no less than seven other methods of cataloguing plans. Provision will be made for the eventual re-numbering as Deposited Plans of all plans previously registered in the three other existing registers or catalogued.

Following registration, a copy of each plan will be filed in the Plan Room as a charting plan, on which will be charted references to current certificates of title. At present only plans of subdivision containing five or more lots—approximately ten per cent of all plans registered—are filed as charting plans.

In addition, a card containing the current reference to title for each lot in a plan will be filed in the public search room adjacent to the Register Book. A searcher knowing the plan and lot number will be able to ascertain the current reference to title without inspection of the charting plan, and as that certificate of title will be in respect of the single lot he will have far more chance of securing it than under the existing system.

Limits of bound register

Although these changes which I have outlined should go far towards solving current problems, it is evident that planning must extend even further. The limits set by a bound register on searching and work flow must be removed if maximum efficiency is to be attained. It is proposed, therefore, when the mass production programme is operating satisfactorily and increased accommodation is available, to cease binding and to file folios of the register and registered dealings as single documents.

Loose-folio system

The main aspects of the change to loose-folios have already been formulated and detailed planning is under way. Although it is beyond the scope of this address to list the full benefits of a loose-folio system, one benefit which merits special mention is that the system would make possible a quick photographic service by which a searcher, on payment of a cost-covering fee, would receive a copy of the title stamped with the date and time of issue instead of inspecting the original title as at present.

New form of certificate

In anticipation of the register being converted to loose folios it is proposed to issue all mass-produced certificates of title in a form suitable for conversion. A new form of certificate of title has been prepared, being the same size as that for dealings and designed to facilitate searching, registration work flow and operation of the xerographic and offset printing equipment. Every certificate of title issued in this form will be backed by the full charting system of which I have spoken. Those for lots in Deposited Plans will also be backed by the reference cards. Progressively, the old-type certificates will be replaced by the new.

ARTIFICIAL INSEMINATION

by

DAVID M. SELBY
One of Her Majesty's Counsel

Artificial insemination of human beings is commonly regarded as a recent accomplishment of medical science, but the first recorded case in which success was achieved in England took place one hundred and fifty years ago; the first recorded successful treatment in the U.S.A. occurring in 1866. It is a subject which arouses a surprising amount of vehemence amongst its protagonists and antagonists, not only amongst churchmen and others on moral grounds, but amongst doctors and lawyers. There are many who seem to find it difficult to discuss the matter calmly and dispassionately. The absence of reliable statistics or of decisions of appellate courts makes it almost impossible to form any authoritative views but such views as are from time to time expressed on the psychological, physiological and legal aspects of the matter show quite a remarkable diversity of opinion.

Many doctors regard A.I.D. (artificial insemination from an unknown donor) as highly dangerous psychologically and cite cases of women losing their mental stability as a result of supervening guilt complexes and speak of broken homes through husbands developing an almost pathological jealousy of the unknown donor or a violent antipathy to the child. Others speak of the wonderful harmony which develops in the family on the removal of the frustration engendered by an infertile husband and the deep sense of fulfilment achieved by the wife on becoming a mother.

From the physiological point of view, some medical men regard the chance of success as remote, whilst others claim that 70 per cent of cases of A.I.D. are successful, conception occurring within the first three months of treatment in the vast majority of cases.[1]

Judges have stigmatized the practice as adulterous or as constituting grounds for divorce;[2] others have found themselves unable to conceive how such a practice could be regarded as adultery.[3] In 1948 the Archbishop of Canterbury appointed a committee to study the matter and approved its report that the evils involved are so great that early consideration should be given to framing legislation making the practice a criminal offence. The Royal Commission on Marriage and Divorce in England, 1951-1955, recommended *inter alia* that artificial insemination of a wife without her husband's consent should be made a ground for divorce and a committee under the chairmanship of the Earl of Feversham in 1958 made the same

[1] Guttmacher & Meares: *Babies by Choice or by Chance*, (1960).
[2] *Orford* v. *Orford* (1921), 58 D.L.R. 251.
[3] *Maclennan* v. *Maclennan*, [1958] S.C. 105.

recommendation but, though strongly deprecating the practice, did not consider that it should be made a criminal offence. The Feversham Committee also recommended that the law should be so changed as to debar a husband or a wife from presenting a petition for annulment of marriage on the ground of impotence if a child has been born as a result of artificial insemination to which the husband consented and to make a husband liable for the maintenance of a child born to his wife as a result of A.I.D. to which he has consented. The late Pope Pius XII denounced artificial insemination as immoral and absolutely illicit.

Faced with this welter of conflicting views it would be a rash person who set down his own opinion on the problems involved and the following is, in the main, no more than an indication of some of the legal problems which arise.

Matrimonial offences

It is difficult to see how A.I.D. without the knowledge of the husband or even contrary to his expressed wishes could constitute adultery. Whether or not it could, by some Procrustean operation, be fitted into one of the classical definitions of adultery, those definitions were not framed with the practice of artificial insemination in mind and it seems most unrealistic to regard any act as constituting adultery in the absence of some element of sexual gratification or illicit liaison. On the other hand, with the almost universal abolition of the Rule in *Russell* v. *Russell* it would be open to the husband to prove non-access for the relevant period and on proof of the birth of a child the court could infer adultery on the part of the wife. Such inference, however, would not be open to the court if it was satisfied that the child was born as a result of artificial insemination. This defence was raised in a recent Scottish case[4] but the wife failed in her defence on a point of pleading. In that case, LORD WHEATLEY held that artificial insemination without the husband's consent did not constitute adultery according to Scottish law, and His Lordship considered that the law would be the same in England. Indeed, it might be argued in England, where adultery must be proved beyond reasonable doubt, that proof of non-access for the relevant period followed by the birth of a child would not be sufficient to justify a finding of adultery since an inference might be drawn consistent with innocence, namely that the child was born as a result of A.I.D. There is no record of any counsel for a wife having had the hardihood to advance such an argument.

In certain circumstances the practice might amount to cruelty if the husband could prove that he objected to it, that it caused him such distress that his health suffered and that his wife persisted in the practice with the knowledge that such persistence was injuring her husband's health. As the law now stands it is difficult to see how the practice could constitute any other matrimonial offence.

[4] *Maclennan* v. *Maclennan*, [1958] S.C. 105.

Legitimacy of the child

There is a strong presumption that a child born in lawful wedlock is legitimate. The presumption is rebuttable and if it could be proved that the husband could not have been the father of the child and that the child was born as a result of A.I.D., such child might well be held to be illegitimate. Where a child had been born as a result of A.I.H. (artificial insemination with the husband's semen), PEARCE, J., on a petition for nullity on the ground of impotence, held that the wife had not approbated the marriage and granted a decree of nullity although it had the effect of bastardizing the child.[5] This decision, of course, has no bearing on the question whether a child born as a result of A.I.D. is legitimate or illegitimate but its effect is one which one of the recommendations of the Feversham Committee seeks to avoid.

It might be noted that a doctor could be in difficulty in certifying as to the paternity of a child if he was aware of the fact that it had been born as a result of A.I.D. The mother would be in similar difficulty in supplying particulars for registration of the birth of the child. These difficulties are sometimes obviated by the rather casuistic expedient of mixing some of the husband's semen with that of the unknown donor. The donor is not, of course, necessarily unknown to the doctor although his identity is never, as a matter of practice, disclosed by the doctor, who frequently uses great care in picking a donor who presents as many as possible of the physical characteristics of the husband. It is sometimes argued that the selective breeding which can be attained with A.I.D. is a powerful factor in its favour. Why, it is asked, when we take such pains with the breeding of horses and cattle, should the human race be allowed to breed indiscriminately?

Other legal problems relating to the child

Many other legal problems can arise in relation to a child born as a result of A.I.D., but available space permits no more than a brief mention of their general nature. Difficult questions of inheritance, for instance, may be involved. If it is proved that the husband is not the father of the child, such child, presumably, could not inherit on the husband's intestacy. It seems scarcely probable that the child could inherit on the intestacy of the donor, should the donor be known. Is he entitled to take as a nephew a gift in a will of a brother or sister of the husband? Is he entitled to apply against the husband's estate under the Testator's Family Maintenance Act or to sue under the Compensation to Relatives Act on the husband's death? What is the husband's duty to maintain him or the husband's right to access in the event of the mother being granted custody? These are only some of the problems which come to mind and many similar ones may be envisaged.

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[5] *R.E.L.* v. *E.L.*, [1949] P. 211.

Other legal problems

Antagonists of the practice point to the possibility of incestuous marriages between a child of the donor and a child born as a result of artificial insemination with the donor's semen. Such possibility, remote as it is, exists, but it might be mentioned that the same possibility exists in the case of some adoptions. Speculation is often heard as to the position of a doctor who performs the operation. If it is performed without the husband's consent or knowledge, is he liable for damages at the suit of the husband, or if the child develops some inherited disease or turns out to be of, say, coloured blood, is the doctor liable at the suit of the mother?

Other rather fanciful problems are sometimes raised, such as, for instance, the possibility of the donor being cited by the husband as co-respondent or of the donor's wife petitioning for divorce on the ground of adultery. Such possibilities seem rather far-fetched, but many of the other matters mentioned raise undoubted problems which sooner or later must be solved. It has been estimated that 200 women are treated annually by A.I.D. in England, and that between 5,000 and 7,000 births occur each year in U.S.A. as a result of A.I.D.[6] Whether or not these figures are exaggerated, they are substantial enough to indicate that the problems involved are very real ones for society and that the time cannot be far distant when the legal position, at least, must be clarified by legislation.

[6] Guttmacher & Meares: *Babies by Choice or by Chance.*

CASE NOTES

Bailment of Goods for Reward

Contract of cool storage—loss or damage to goods bailed—duties of bailee—onus of proof—res ipsa loquitur.—The present case concerned a contract of bailment for two consignments of peas under which the defendant agreed for reward to receive the goods into his cool store, keep them there in a refrigerated chamber and then redeliver them to the plaintiff on the following day in such good condition as was consistent with proper storage.

The Full Supreme Court of Victoria held that under such a bailment the onus was on the plaintiff to prove both the contract and a breach of it consisting either in the non-delivery or delivery in a damaged condition of the goods, the latter meaning a condition worse than that contemplated by the contract for their delivery. However, once such a breach was proved, the onus lay on the defendant to prove that the damage to, or the loss of, the goods was not due to any failure on his part. It would be insufficient for the defendant, if the goods were shown to have deteriorated while they were in his custody, merely to suggest that this may have been due to inherent vice in the goods themselves, unless he failed to exclude, at any rate on the balance of probabilities, the hypothesis that it was due to his own breach of duty.

SHOLL, J., delivering the judgment of the Court, pointed out that the onus resting on the defendant in such cases was the ultimate onus or "legal" onus, i.e., the risk of non-persuasion and not merely the shifting onus, or the onus of going forward with evidence. Thus, if the plaintiff proved the contract and the non-delivery of the goods, or the delivery in a damaged condition of goods which were not damaged at the time when they were bailed, and the defendant left it *in dubio* whether or not the non-delivery or the damage was due to his fault then the plaintiff should succeed. This was the difference between the way in which the law has worked out the position of a bailee for reward and the way it has worked out the method of applying the presumption of fact expressed in the maxim *res ipsa loquitur*. In the case of a bailment for safe custody for reward, the matter of exculpation of the defendant has been treated by showing absence of negligence, or special authority from the plaintiff to deliver otherwise than in accordance with the contract, as something to be pleaded by the defendant by way of confession and avoidance. On the other hand, in a so-called *res ipsa loquitur* case, if it was in doubt at the close of all the evidence whether or not the negligence of the defendant was the cause of the damage, then, notwithstanding the factual inference which initially the presumption expressed by the maxim warranted, the plaintiff must fail.

His Honour also declared that where, as in the present case, the contract was in effect merely to store the goods in a refrigerated place, it appeared to be substantially and indeed predominantly a contract of bailment though involving an

obligation on the part of the bailee to keep the temperature of the cool store within the appropriate range in accordance with ordinary usage, so far as he reasonably could, and to re-deliver the goods to the bailor in such good condition as was consistent with proper storage. Where the contract merely provided for storage in a cool store then once it appeared that the goods had been redelivered in a damaged condition, or in an insufficiently cooled and preserved condition apparently due to insufficient refrigeration, that was evidence of breach of such a contract of bailment, and it was then for the cool store proprietor to show that the trouble occurred without any fault of his for which he could be liable. Thus, the plaintiff could not be bound, for instance, to exclude the possibility of a general electrical failure in the area, the stopping of refrigerating machinery or the leaving open of the cool chamber doors by unauthorized intruders. (*Fankhauser* v. *Mark Dykes Pty. Ltd.*, [1960] V.R. 376.)

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